

Date of Hearing: July 16, 2015

ASSEMBLY COMMITTEE ON REVENUE AND TAXATION

Philip Ting, Chair

SB 251 (Roth) – As Amended July 13, 2015

**PENDING TWO-DAY FILE NOTICE WAIVER**

Majority vote. Fiscal committee.

**SENATE VOTE:** 40-0

**SUBJECT:** Civil rights: disability access

**SUMMARY:** Provides a credit under the Personal Income Tax (PIT) Law and the Corporation Tax (CT) Law to a small business for eligible access expenditures in excess of \$250 but less than \$10,250. Specifically, **the tax-related provisions of this bill:**

- 1) Provide, beginning on or after January 1, 2016, and before January 1, 2023, a credit equal to 50% of the eligible access expenditures that are in excess of \$250 but less than \$10,250.
- 2) Define an “eligible access expenditure” as having the same meaning as defined in Internal Revenue Code (IRC) Section 44(c), except that the amount may be paid or incurred by a taxpayer other than an eligible small business.
- 3) Define a “small business” as a trade or business that has average gross receipts, less returns and allowances reportable to California, of less than \$3.5 million and has employed 25 or fewer employees in the three immediately preceding taxable years.
- 4) Define a “full-time employee” as an employee of the taxpayer who works at least 30 hours per week.
- 5) Define “gross receipts, less returns and allowances reportable to this state” as the sum of the gross receipts from the production of business income, as defined in Revenue and Taxation Code (R&TC) Section 25120(a), and the gross receipts from the production of nonbusiness income, as defined in R&TC Section 25120(d).
- 6) Provide that the \$3.5 million threshold includes the gross receipts of all taxpayers required or authorized to be included in a combined report pursuant to R&TC Section 25101 or 25101.15.
- 7) Provide that in the case of a partnership, the limitation under this bill shall apply with respect to the partnership and each partner. A similar rule shall apply in the case of an “S” corporation.

- 8) Provide that the credit may only be claimed on a timely filed original return of the taxpayer.
- 9) Provide that no credit or deduction would be allowed for the same expenses for which this credit is allowed and that the adjusted basis of property would not be increased by the amount of credit allowed.
- 10) Provide that any unused portion of the credit may be carried over to the following year, and the succeeding six year until the credit is exhausted.
- 11) Provide that the Franchise Tax Board (FTB) may prescribe rules, guidelines, or procedures necessary or appropriate to carry out the purpose of this bill.
- 12) Provide that it is the intent of the Legislature to make the findings required by R&TC Section 41.
- 13) Repeal the credit on December 1, 2023.

**EXISTING FEDERAL LAW:**

- 1) Allows a credit to eligible small businesses related to costs paid or incurred for complying with the Americans with Disabilities Act (ADA). An eligible small business means an electing taxpayer with either gross receipts for the preceding taxable year of \$1 million or less, or not more than 30 full-time employees during the preceding taxable year. The credit is computed as 50% of the eligible access expenditures for the taxable year in excess of \$250 but not more than \$10,250.
- 2) Provides that eligible access expenditures must be made to enable the qualified small business to comply with the ADA requirements, including costs to remove the architectural, communication, physical, or transportation barriers of persons with disabilities. Costs also include qualified interpreters or equipment to make materials available to person with hearing impairments, costs of qualified readers or equipment to make material available to persons with visual impairments, and costs to acquire or modify equipment for persons with disabilities.
- 3) Provides that the tax credit may be used against the net tax of the taxpayer and the excess, while not refundable, is available for carryback to the immediately preceding tax year and may be carried forward to the following 20 taxable years or until exhausted. Taxpayers may not increase the adjusted basis of property or claim any deduction for eligible access expenditures that qualify for the credit.

**EXISTING STATE LAW:**

- 1) Allows, in modified conformity to federal law, a tax credit for the amount paid or incurred by eligible small business for the improvements to the property in order to provide access to disabled individuals of up to 50% of the eligible access expenditures for the taxable year, but not to exceed \$250. The maximum allowed to a small business is \$125.

- 2) Creates a Certified Access Specialists Program (CAsp) designed to meet the public's need for experienced, trained, and tested individuals who can inspect buildings and sites for compliance with applicable state and federal construction accessibility standards.
- 3) Defines a "certified access specialist" (CAS) as a person that has met the certification requirements as provided for by the State Architect

**FISCAL EFFECT:** The FTB estimates General Fund revenue loss of \$3 million for Fiscal Year (FY) 2015-16, \$7.6 million for FY 2016-17, and \$10 million for FY 2017-18

**COMMENTS:**

- 1) Author's Statement: The author has provided the following statement in support of this bill:

California's higher accessibility standard and the ability for a disabled person who has been discriminated against to seek civil statutory damages has been a powerful force in making many more businesses and buildings accessible to those with disabilities. Unfortunately, small (micro) businesses are frequently unaware of ADA requirements. They move into retail or office space that has been certified as habitable by local government planning and code inspections, receiving a certificate of occupancy and believe that with this certification they are fully able to operate as a lawful enterprise. They do not discover they may have potential ADA violations until they are threatened with litigation. Many of these small businesses would, in good faith, address and remediate the ADA violations had they been educated of their responsibilities and the requirements of the law. For some businesses the potential costs of repairs, in addition to costs associated with defending a potential lawsuit to avoid litigation have forced them to close their businesses. Businesses are not utilizing a CAsp to help them comply with the law as much as they should be. Part of this is businesses not being aware of the existence and purpose of certified CAsps. Rather than rely solely on the court system to enforce the ADA, it is the intent of this bill to provide businesses who wish to comply fully with the law an incentive to use a CAsp to find and fix their construction related violations, while protecting the ability of disabled persons who encounter discrimination to sue for compliance and damages if that business fails to fix its violations. This bill will help ensure individuals with disabilities have a full and fair opportunity to access facilities and services in California and further ensure that business owners and operators have the education and training necessary to comply with federal and state disability access law and regulation.

- 2) Arguments in Support: Consumer Attorneys of California argue that this bill seeks to balance the interest of making "buildings more accessible for people with disabilities while at the same time stopping the abusive practices of some attorneys who are filing multiple lawsuits against mostly small businesses and seeking fees, not compliance." Proponents of this bill are open to other solutions such as an amnesty program for businesses to hire a CAS.
- 3) What Does this Bill Do: This bill contains three main provisions: (a) a rebuttable presumption that certain "technical violations" do not cause a person difficulty, discomfort, or embarrassment; (b) protection for businesses with 100 or less employees from liability from minimum statutory damages in construction-related accessibility claims, as specified, and provides 120 days to correct violations after the business has obtained an inspection of

its premises by a CAS; and (c) a tax credit for specified access disability expenditures. Access disability expenditures include amounts paid to:

- a) Remove barriers that prevent a business from being accessible to or usable by individuals with disabilities;
  - b) Provide qualified interpreters or other methods of making audio materials available to hearing-impaired individuals;
  - c) Provide qualified readers, taped texts, and other methods of making visual materials available to individuals with visual impairments; and,
  - d) Acquire or modify equipment or devices for individuals with disabilities.
- 4) Purpose of the Tax Credit: As explained by the author, the purpose of the bill is, in part, to “ensure that business owners and operators have the education and training necessary to comply with federal and state disability access law and regulation.” The author further states that “[m]any of these small businesses would, in good faith, address and remediate the ADA violations had they been educated of their responsibilities and the requirements of the law.” Despite the stated purpose, it is unclear how a tax credit for accessibility improvements would help educate business owners or help them become aware of unknown violations. Assuming that a lack of knowledge is the biggest problem, a business owner who wrongly believes himself/herself to be in compliance with the law is unlikely to utilize this credit specifically because he/she wrongly believes he/she is in compliance. A business owner is also unlikely to seek the assistance of a CAS if the business owner wrongly believes he/she is in compliance. It appears that this credit has the potential of only encouraging compliance with the law from business owners who are aware that their places of business currently violate building standards.

The possibility of helping individuals who know that they are in violation of the law also raises an interesting policy question as to whether or not the state should be subsidizing compliance. Citizens are expected to know and comply with the law, irrespective of the law’s complexity. Furthermore, a violation of law is generally accompanied by a fine or imprisonment, not a subsidy to comply.

- 5) Cost-Benefit Analysis of Improving Disability Access: Despite providing a substantial subsidy, it is unclear if the credit would have a substantial impact on increasing disability access. Business owners may decide to make disability access improvements because it is the right thing to do or in response to the risk of litigation, but business decisions are primarily driven with the goal of making a profit. To that end, improving disability access may bring in new customers that would otherwise not patronize the store, but the costs of making disability improvements would have to be outweighed by any increase in revenue that might occur from new customers. Remodeling bathrooms, adding automatic doors, making substantial modifications to the entry way of a store can all be very expensive improvements, far exceeding the \$10,250 cap on qualifying expenditures. Accessibility improvements would also have to be weighed against other available opportunities to increase revenue and profit such as purchasing new software, computers, or making changes to the façade of the store to attract more customers.

Increasing the tax credit available to business owners might encourage a few businesses owners to make additional improvements but, as with any tax credit, some of the subsidy will be provided to individuals who would have made improvements because of a legal obligation. If the purpose of the bill is to educate businesses and improve accessibility, increasing penalties for violating building and accessibility standards may be more effective.

- 6) 100% of Eligible Expenses: The state credit, when taken with the federal credit, provides a dollar-for-dollar reduction in income tax liability equal to 100% (50% state credit + 50% federal credit) of “eligible access expenditures.” In essence, the Federal Government and the State of California pay for almost all qualifying expenses under \$10,250. As a general policy, California has almost always provided a much smaller percentage of credits than those provided by federal law. As existing law demonstrates, California provides \$125 to small businesses for eligible access expenditures while the Federal Government provides \$5,000. As currently drafted, not only would this bill move away from existing tax policy, it would also require California to pay more of the qualifying expenses than the Federal Government (\$5,125 from the state versus \$5,000 from the Federal Government) because the existing state credit of \$125 is maintained. As such, the Committee may wish to reduce the credit percentage from 50% to 10%.
- 7) Tax Expenditure vs. Direct Expenditure: Existing law provides various credits, deductions, exclusions, and exemptions for particular taxpayer groups. In the late 1960s, U.S. Treasury officials began arguing that these features of the tax law should be referred to as “expenditures” since they are generally enacted to accomplish some governmental purpose and there is a determinable cost associated with each (in the form of foregone revenues). Former Federal Reserve Chairman Alan Greenspan has stated that tax expenditures are “misclassified” because they are identical to outlays. Additionally, Gregory Mankiw, who led President George W. Bush’s Council of Economic Advisers, calls expenditures “stealth spending implemented through the tax code.”<sup>1</sup>

As the Department of Finance notes in its annual Tax Expenditure Report, there are several key differences between tax expenditures and direct expenditures. First, tax expenditures are reviewed less frequently than direct expenditures once they are put in place. While this affords taxpayers greater financial predictability, it can also result in tax expenditures remaining a part of the tax code without demonstrating any public benefit. Second, there is generally no control over the amount of revenue losses associated with any given tax expenditure. The FTB estimates annual revenue losses of \$10 million for this credit but the costs could be far greater. Finally, it should also be noted that, once enacted, it takes a two-thirds vote to rescind an existing tax expenditure absent a sunset date, effectively resulting in a “one-way ratchet” whereby tax expenditures can be conferred by a majority vote, but cannot be rescinded, irrespective of their cost or efficacy, without a supermajority vote. In light of these concerns, the Committee may wish to reduce the sunset date to five years.

- 8) Definition of Small Business differs from Federal Definition: This bill provides a credit to a “small business” with an average of less than \$3.5 million in gross receipts and less than 25 employees in the preceding three years. The federal program defines a “small business” as having gross receipts of less than \$1 million in gross receipts or a business with no more than

---

<sup>1</sup> Ezra Klein, *Wonkbook: Tax Spending vs. Government Spending*, Washington Post, 2012.

30 full-time employees during the preceding taxable year. Having two different definitions can create confusion among taxpayers. The small business definition found in this bill was chosen because the author is attempting to aid small businesses that may be subject to statutory damages under Civil Code (CC) Section 55.56. However, in order mitigate confusion among taxpayers seeking this credit, the Committee may wish to conform entirely to the federal credit and provide a 10% credit to businesses that meet the requirements of the federal definition.

- 9) California already Conforms to IRC Section 44: This bill does not specifically conform to federal law, but instead creates a standalone credit that borrows many of the definitions found in IRC Section 44. The enactment of a separate credit seems odd since California already conforms to IRC Section 44. As noted above, conformity can reduce administrative costs and confusion among taxpayers. As such, the Committee may wish to modify the state's existing tax credit instead of creating a standalone credit.
- 10) Performance Measurement Standards: Existing law requires any bill, introduced on or after January 1, 2015, that would authorize a new credit under either the PIT Law or the CT Law to provide performance measurement standards. According to legislative findings and declarations, tax preferences represent a major exercise of government power, but face less oversight than the spending side of the budget. As a way of ensuring transparency and accountability when investing public dollars through tax credit programs, the Legislature has decided to apply performance measurement standards as a way of reviewing tax credits with the same level of scrutiny as spending programs.

This bill does not currently address requirements as provided for under Revenue and Taxation Code Section 41, but the author's office has provided a statement specifying that this tax credit advances the public policy that a small business' funds are better spent correcting violations than defending lawsuits. To this end, the author's office has proposed looking at the following performance indicators:

- a) The number of businesses statewide that claim the tax credit compared to the number of eligible businesses with construction violations;
- b) Whether the number of businesses claiming the credit has increased from the number of businesses currently claiming the tax credit;
- c) Within the years this tax credit is available, the number of businesses that claim the tax credit on an annual basis, with year over year increases and whether the growth, if any, is due to an increase in awareness of the ADA;
- d) The average and median amounts claimed by businesses, the number of businesses claiming the full credit, and whether the credit offered is adequate to incentivize costly construction related improvements; and,
- e) The average amount a business spends on accessibility improvements when claiming the credit and comparing the increase with existing enforcement measures and incentives.

Furthermore, the FTB and the State Architecture shall annually collect the following information:

- a) The estimated number of businesses with accessibility violations;
- b) The number of businesses that claimed the existing \$250 credit and the loss to the General Fund as a result;
- c) The number of businesses that claim this increased credit annually; and,
- d) Information regarding the expenditures made by businesses claiming the credit.

11) Double Referral: This bill was double-referred to the Assembly Committee on Judiciary, which passed this bill on July 14, 2015, with a vote of 10-0. For additional discussion of disability access laws related to this bill, please refer to the analysis prepared by the Assembly Committee on Judiciary.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Consumer Attorneys of California (Co-Sponsor)  
 Apartment Association, California Southern Cities  
 Apartment Association of Orange County  
 Associated Builders and Contractors of California  
 CalAsian Chamber of Commerce  
 California Chamber of Commerce  
 California Ambulance Association  
 California Association of Bed and Breakfast Inns  
 California Business Properties Association  
 California Citizens Against Lawsuit Abuse  
 California Grocers Association  
 California Hotel and Lodging Association  
 California Manufacturers and Technology Association  
 California Retailers Association  
 Camarillo Chamber of Commerce  
 Chamber of Commerce Alliance of Ventura and Santa Barbara Counties  
 Chamber of Commerce Mountain View  
 Civil Justice Association of California  
 Culver City Chamber of Commerce  
 East Bay Rental Housing Association  
 Fairfield-Suisun Chamber of Commerce  
 Family Business Association  
 Fullerton Chamber of Commerce  
 Greater Bakersfield Chamber of Commerce  
 Greater Fresno Area Chamber of Commerce  
 Greater Riverside Chamber of Commerce  
 Greater San Francisco Valley Chamber of Commerce  
 National Association of Theater Owners of California/Nevada  
 National Federation of Independent Business  
 NorCal Rental Housing Association  
 North Lake Tahoe Chamber of Commerce  
 North Valley Property Owners Association

Orange County Business Council  
Oxnard Chamber of Commerce  
Rancho Cordova Chamber of Commerce  
Redondo Beach Chamber of Commerce and Visitors Bureau  
San Jose Silicon Valley Chamber of Commerce  
Santa Ana Chamber of Commerce  
Santa Maria Valley Chamber of Commerce Visitor and Convention Bureau  
Simi Valley Chamber of Commerce and Visitors Bureau  
South Bay Association of Chamber of Commerce  
South Lake Tahoe Chamber of Commerce  
Southwest California Legislative Council  
State of California Auto Dismantlers Association  
Torrance Area Chamber of Commerce

**Opposition**

None on file

**Analysis Prepared by:** Carlos Anguiano / REV. & TAX. / (916) 319-2098